IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1422 of 2005
With
CRIMINAL APPEAL No. 1544 of 2004
With
CRIMINAL APPEAL No. 1925 of 2004
With
CRIMINAL APPEAL No. 2234 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMESHBHAI MOHANBHAI KOLI - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

Criminal Appeal Nos. 1422 of 2005, 1925 of 2004 and 2234 of 2004
MR MC Barot for Appellants
MR RC Kodekar APP for Respondent
MR YS Lakhani for original complainant

Criminal Appeal No. 1544 of 2004
Mr SV Raju for appellant
Mr RC Kodekar APP for respondent
Mr YS Lakhani for original complainant
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 16-17-18-25/10/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. These four criminal appeals under Section 374 of the Code of Criminal Procedure ('the Code' for short) are directed against the judgment and order dated 23.8.2004 rendered in Sessions Case No.34 of 2000 by the learned Additional Sessions Judge, Second Fast Track Judge, Gondal, by which the appellants of Criminal Appeal No.1422 of 2005

and appellant of Criminal Appeal No.2234 of 2004 (A-1, A-2, A-3 and A-4) are convicted for commission of the offence under Section 302 of the Indian Penal Code ('IPC' for short) read with Section 34 IPC and under Section 135 of the Bombay Police Act ('BP Act') and each of them is sentenced to suffer imprisonment for life and fine of Rs.5,000/-, in default, R.I. for one year for the offence under Section 302 IPC read with Section 34 IPC and RI for one year and fine of Rs.1,000/-, in default, RI for one month for the offence under Section 135 of the BP Act whereas appellant of Criminal Appeal No.1544 of 2004 (A-6) and appellants of Criminal Appeal No. 1925 of 2004 (A-5 and A-7) are convicted for commission of the offence under Section 302 IPC read with Section 120B IPC and sentenced to suffer imprisonment for life and fine of Rs.5,000/-, in default, RI for one year for the offence under Section 302 IPC read with Section 120B IPC. It is also further directed that A-5 and A-6, each, shall pay Rs.1,50,000/- as compensation to the widow of deceased Prakashbhai Raveshia and on

their depositing the said amount the same shall be paid to her. The order further stipulated that A-8 who was charged for commission of offence under Section 312 IPC for harbouring the accused, has been acquitted.

2. Background facts as projected by the prosecution as also disclosed in the FIR as well as unfolded during the trial are as under:

2.1. P.W.116, Vinubhai Pragjibhai Raveshia, uncle of the deceased-victim Prakash Raveshia, has, inter alia, stated in his complaint that Prakash Raveshia was an Ex-President of the Morbi Municipality and at the time of the incident he was Chairman of the Morbi Nagrik Bank and was a member of the Executive of the Gujarat Pradesh B.J.P. It is alleged by him in the complaint that on 16.9.1999 at 5:30 in the evening, he was at his Stall/Cart at the Nehru Gate. At that time, Kishoresinh Durbar had come and told him that Prakash had been attacked near the bank, he has been taken to the hospital and his condition was

serious. Hence, he ran and went straight to the hospital. It is alleged in the complaint that on reaching the hospital, the doctor and the staff told him that Prakash was no more. In the meanwhile he had met Bhupat, son of his elder brother Parmanandbhai and he told him that “before the incident took place at the bank, he was going on the road, at that time the Directors of the Bank, Amubhai Kotak, Ashokbhai Kathrani, Jagdishbhai Seta and Anilbhai Mehta and the Bank staff as well as Prakashbhai were present there. They all had a meeting at the bank. Thereafter when he again passed from there after three minutes, he saw Prakash lying in a heavily bleeding condition. He has sustained knife injuries and could not speak. At that time, Anilbhai, Ashokbhai and Amubhai were present there and Prakashbhai was taken in the Bank's Sumo car and Anilbhai had come to the hospital”. It was further alleged in the complaint that Bhupatbhai has come to the hospital on a scooter and Anilbhai was present at the hospital and he had informed him that he had reached there at the

time of the incident and had seen three persons running towards the hotel with open knives.

It is further case of the complainant that as his nephew was involved in politics since about eight years, he used to have differences with a lot of people. Recently during the unveiling ceremony of the statue of Swami Vivekanand and inauguration of the Water Sump held by the Morbi Municipality near Durbargadh, members of the Municipality, the MLA from Morbi, the President of the City BJP Pradeepbhai Vala and Dalchandbhai Mehta were present. When the programme was over, the lady member of the Municipality Jayshreeben Ghoghani orally made a complaint to Prakash that presently all are present and that for the last one and a half years since the death of her husband she had been complaining to all of them that instalments are being recovered from her Travels firm. In this regard, Prakash had told her that the MLA was standing there, complain to him whereupon the MLA said that they should all sit together at the

Circuit House, hence they had all gone there. Khambhalia Saheb had been called there and he was told about the money being taken from Jayshreeben's Travels firm. At that time Prakashbhai had said that why should the instalments be stopped only in case of Jayshreeben alone? Whereupon Khambhalia Saheb had said that if the MLA says so they would stop taking instalments from all. After this incident there was a hot exchange of words between the MLA and Prakashbhai and collars were seized and revolver was taken out, at that time Harishbhai Jadav and Aniruddsinh had intervened and saved Prakash.

It is further alleged in the complaint that thereafter, upon reading a press note issued in the newspaper, the MLA had rung him up and asked what was the necessity of giving publicity to the press note in the newspaper and told him that it would be better if he made Prakash understand. Thereafter he had made a telephone call to Pradeep Vala apprising him of the

situation and told him that the reputation of the party should not be spoilt whereupon Pradeepbhai had told him that he and Dalchand should meet him on the next day. On the next day Pradeepbhai told him that upon talking to the MLA on the phone, he had refused to sit with any of them and said that he would come to an understanding with Prakash in his own way.

It is further case of the complainant that on the next day in the morning when he went to Prakash's office he had told him that late at night Khambhalia Saheb had called him up on the telephone at home and old him that if he was suspended in connection with the Travels instalments, he would blow him off at the Nagar Darwaza Chowk.

It is further case of the complainant that Prakashbhai being a leader, being involved in politics as well as being a stamp vendor was aware of scams in respect of several lands of the town. As per his belief, as Prakash was aware of

the lands of the Marketing Yard, etc., persons connected in the business of such lands as well as other concerned persons together have caused his murder with a view to see that the scams are not exposed. Apart from the aforesaid, Prakash internally had differences with many people and as and when he learnt about the same he would inform them.

It is further alleged in the complaint that three persons had, in public, caused grave injuries on the chest and neck as well as other parts of his nephew's body with knives and had intentionally caused his death.

The complainant has also explained the delay in lodging the complaint by saying that as apart from their relatives, a lot of people had gathered at the hospital at the time of conducting the post-mortem examination on the dead body of Prakash and their relatives were weeping and wailing and were worried. The said complaint was registered on 16.9.1999 i.e., on

the same day, at Morbi City Police Station, vide CR No.I-319/99 for commission of the offences punishable under Sections 302 and 114 IPC and under Sections 37 (1) and 135 of the BP Act, by P.W.160, Harising Jethabhai Jankat, PI Rajkot District Rural as per the direction of DSP, Rajkot Rural.

2.2. Pursuant to the registration of the complaint, investigation was put into motion. Inquest on the dead body of Prakash was held and thereafter the dead body was sent for autopsy. Panchnama of the scene of offence was drawn. Statements of the eye witnesses as well as other witnesses were recorded, various other panchnamas were also drawn. Thereafter A-1 to A-4 and A-7 were arrested.

2.3. During the course of the investigation, as A-1 to A-4 expressed willingness to show the weapons used by them for commission of the offence of murder of Prakashbhai i.e., knives, four separate preliminary panchnamas were drawn

in presence of panchas. Thereafter at the instance of A-1 to A-4, four knives which were stained with blood were recovered from different places and the clothes of the accused which were also stained with blood were recovered by drawing discovery panchnama. The muddamal articles were sent to FSL for chemical analysis. Thereafter Test Identification Parade was arranged through Executive Magistrate in presence of two panchas. As per the prosecution case, in the T.I. parade, two witnesses have identified A-1 to A-4 in presence of panchas. Statements of two witness i.e., Jayeshbhai alias Jailo Vashram and Abdulbhai Ismailbhai Sanghi were recorded under Section 164 of the Code through the learned JMFC, Wankaner.

2.4. During the course of investigation, it was revealed that on 11.9.1999 there was a heated exchange of words as well as a scuffle between A-6, Kantilal Shivlal Patel- Amrutiya and deceased Prakashbhai Raveshia in respect of instalments of Travels at the Morbi Circuit House and because

Prakashbhai had threatened to expose the scams in which A-6, Kantilal Shivlal Patel- Amrutiya was involved and because Prakashbhai and A-6 were political rivals, with a view to get rid of him, A-6, Kantilal had a motive to murder Prakashbhai as well as earlier Prakash had assured A-5, Gangaram Tapubhai Koli that he would enable him to purchase lands belonging to Morbi Municipality at cheap rates but could not do so, and hence Gangaram Tapu also had a motive to murder Prakash. Both A-6 and A-5 had the motive to kill Prakash and hence on 11.9.1999 at night telephonically consented and agreed between themselves to murder Prakash and hatched a criminal conspiracy to murder Prakash and A-1, Ramesh Mohan Koli, A-2, Narottam Premji Vala, A-3, Magan Gokal Koli, A-4, Pravin alias Dalo Laghubhai, A-7, Amit Gangaram Koli and A-8, Bala Bechar Koli later on joined in the conspiracy to kill Prakash and in this manner all the accused hatched a conspiracy to murder Prakash and in furtherance of the same caused the murder of Prakash and as such committed the offence

punishable under Section 302 read with section 120B IPC.

It was also revealed that as a part of the conspiracy, on 16.9.1999 at 17:15 hours, near the Nagrik Bank in Morbi town, A-1, Ramesh Mohan Koli, A-2, Narottam Premji Koli, A-3, Magan Gokal Koli and A-4, Pravin alias Dali Laghubhai Koli with the object of accomplishing their common intention to commit the murder of Prakash and with the object of executing the criminal conspiracy previously hatched by them with A-5, Gangaram Tapubhai Koli, A-6, Kantilal Shivlal Patel-Amrutiya and A-7, Amit Gangaram, armed with lethal weapons like knives, attacked Prakashbhai and caused fatal injuries to him and at that time they were aware that such injuries were sufficient in the ordinary course of nature to cause the death of Prakash and with such knowledge they had murdered Prakashbhai and by doing so all four of them had committed the offences punishable under Sections 302, 34 and 120B IPC.

It was also revealed that A-1, Ramesh Mohan Koli, A-2, Narottam Premji Koli, A-3, Magan Gokal Koli and A-4, Pravin alias Dalo Laghubhai Koli were armed with lethal weapons like knives in public and as such had committed breach of the Notification issued by the District Magistrate under Section 34 of the BP Act and committed the offence punishable under Section 135 of the BP Act.

It was also revealed that A-5, Gangaram Tapubhai Koli, A-6, Kantilal Shivlal Patel – Amrutiya and A-7, Amit Gangaram Koli had hatched a criminal conspiracy to murder Prakash and in furtherance and as a part of the said conspiracy A-1, Ramesh Mohan Koli, A-2, Narottam Premji Koli, A-3, Magan Gokal Koli and A-4, Pravin alias Dalo Laghubhai Koli had committed the murder of Prakash at the aforesaid place, date and time and by doing so A-5, Gangaram Tapu and A-7, Amit Gangaram had committed the offence punishable under section 302 read with Section 120B IPC.

It was also revealed that during the course of investigation of the crime, A-6, Kantilal Shivlal Patel – Amrutiya had in his statement which was produced before the Court by way of evidence stated false facts regarding A-5 and that he knew that the said statement was false yet had made such false statement and knew that the same amounted to an offence yet with a view to protect the accused from being punished he had concealed the true facts and had given false statement and had tampered with the logbook of the hand-shawl Corporation's Tata Sumo No.GJ-18-A-2701 of 11.9.1999 and 20.9.1999 and rendered them illegible and had changed the kilometres and by doing so he had committed the offence punishable under Sections 199, 201 and 204 IPC.

It was also revealed that on 16.9.1999, A-1 to A-4 after committing the murder of Prakash, A-8, Bala Bechar Koli despite having the knowledge that A-1 to A-4 have committed murder, harboured them and with a view to hide them, took

them to different places in an Armada Jeep and by harbouring accused involved in murder, A-8, Bala Bechar Koli had committed the offence punishable under Section 212 IPC.

2.5. After receipt of the autopsy report as well as report from FSL and as sufficient incriminating evidence was found against all the accused persons, including A-8, who is not before us, for commission of the offence of murder of Prakashbhai, filed charge sheet in the Court of learned JMFC, Morbi for commission of offences punishable under Section 302 read with Sections 34 and 120B IPC against all the accused.

2.6. As the offence under Section 302 IPC is exclusively triable by a Court of Sessions, the learned JMFC, Morbi committed the case to the Court of Additional Sessions Judge, at Morbi where it is numbered as Sessions Case No.34 of 2000.

2.7. The learned Additional Sessions Judge to

whom the case was made over for trial, framed charge against all the accused for commission of the offence punishable under Section 302 read with Section 34 IPC read with Section 120B and 135 BP Act. The charges were read over and explained to the accused. The accused pleaded not guilty to the charges and claimed to be tried and, therefore, they were put to trial by the learned Additional Sessions Judge.

2.8. In order to bring home the charges levelled against the accused persons, the prosecution has examined as many as 170 witnesses and relied upon their oral testimonies and also produced 178 documents and relied upon the contents of the same, details of which have been enumerated in paragraph 7 of the impugned judgment and order and as and when required, this Court will discuss the evidence of the witnesses as well as the details of the documents hereinafter in this judgment.

2.9. After recording of the evidence of the

prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against them and recorded their further statement as required under Section 313 of the Code. In their further statement they denied the prosecution case in its entirety and stated that they have been falsely implicated in the murder case of Prakashbhai. They do not know anything about it. A-5 Gangaram Tapu has further stated that he is a reputed member of Koli Community and, therefore, with a view to put an end to his and his son's political career, both of them have been falsely implicated in the murder case. He was also given ticket by the BJP to contest the Assembly Elections from Chotila constituency. So far as A-6 is concerned, he has stated that his wife is not a partner in V.M. Sojitra Company but his wife has taken sub-contract from the said company. He has also stated that with a view to put an end to his political career, false case has been filed against him. In sum and substance, according to the accused persons, they have been falsely roped in the case of murder of

Prakashbhai. However, they neither produced any evidence nor did they examine any witness in support of their defence.

2.10. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court has come to the conclusion that the prosecution has been able to establish that Prakash Raveshia died a homicidal death. The trial court has also held that A-1 to A-4, armed with deadly weapons, which were supplied by A-7, hatched a conspiracy with A-5 to A-7 for committing murder of Prakashbhai and, therefore, complicity of commission of offence punishable under section 302 read with Section 34 IPC read with Section 135 of the BP Act is duly established and the prosecution has successfully proved the charges levelled against A-1 to 4. Similarly, A-5 to A-7 hatched conspiracy with A-1 to A-4 for committing murder of Prakash. Therefore, complicity of A-5 to A-7 for committing murder of Prakash punishable under Section 302 read with Section 120B IPC is also

duly proved. Rest of the charge levelled against A-6 has not been proved by the prosecution. Similarly, the charge levelled against A-8 who is not before us (for commission of offence under section 312 IPC, i.e., harbouring the accused) has also not been established.

2.11. On the aforesaid findings, the trial court convicted A-1 to A-4 for commission of the offence under Section 302 read with Section 34 IPC and under Section 135 of the BP Act and each one of them is sentenced to suffer imprisonment for life and fine of Rs.5,000/-, in default, RI for one year for the offence under Section 302 IPC read with Section 34 IPC and RI for one year and fine of Rs.1,000/-, in default, RI for one month for the offence under Section 135 of the BP Act whereas A-5, A-6 and A-7 are convicted for commission of the offence under Section 302 IPC read with Section 120B IPC and sentenced to suffer imprisonment for life and fine of Rs.5,000/-, in default, RI for one year for the offence under Section 302 IPC read with Section

120B IPC and it is also further directed that A-5 and A-6, each, shall pay Rs.1,50,000/- as compensation to the widow of deceased Prakashbhai Raveshia and on their depositing the said amount the same shall be paid to her, which has given rise to instant four appeals at the instance of the accused Nos.1 to 7. It may be noted that A-8 has been acquitted of the offence of harbouring the accused under Section 312 IPC.

3. Criminal Appeal No.1422 of 2005 has been filed by A-1 to A-4, Criminal Appeal No.1544 of 2004 has been filed by A-6 and Criminal Appeal No. 1925 of 2004 has been filed by A-5 and A-7 whereas Criminal Appeal No.2234 of 2004 has been filed by A-4 through jail.

4. Mr. Manubhai Barot, learned advocate for A-1 to A-4, who have filed Criminal Appeal Nos.1422 of 2005 and Criminal Appeal No.2234 of 2004 made his elaborate submissions which are summarized as under:

(i) None of the so-called eye witnesses to the alleged incident of murder of Prakashbhai has supported the prosecution case and, therefore, from their evidence, the prosecution could not establish the complicity of A-1 to A-4 who are allegedly the assailants and have caused murder of Prakashbhai.

(ii) The prosecution also tried to establish the complicity of A-1 to A-4 from the evidence of T.I. Parade which was held by two Executive Magistrates but the witnesses who have allegedly identified A-1 to A-4 have not supported the prosecution case. Two panch witnesses have also not supported the T.I. Parade. But one panch witness has supported the TI parade. Merely because the Executive Magistrates have supported the evidence of T.I. parade that itself is not sufficient to hold that in the T.I. Parade the witnesses have identified the accused and that the TI Parade was held in accordance with law and it cannot be said that on the basis of T.I. Parade, complicity of A-1 to A-4 has been

established. According to him, the TI parade was only an empty formality and it was not held as per the rules and regulations of Bombay Police Manual and therefore no reliance can be placed on the so-called evidence of T.I. parade and evidence of the panchas as well as the Executive Magistrates.

To canvass the proposition that since the TI parade was not conducted as per the rules and regulations and norms of the Bombay Police Manual the evidence of T.I. Parade is not acceptable, he has relied upon the following decisions:

(a) Caetano Fiedade Fernandes and another v. Union Territory of Goa, Daman and Diu, Panaji, Goa, (1977) 1 SCC 707,

(b) Wakil Singh and others v. State of Bihar, 1981(Supp)SCC28.

(c) Yeshwant and others v. The State of Maharashtra, (1972) 3 SCC 639.

(iii) The prosecution also tried to establish the case against the accused on the basis of the statements of two witnesses recorded under Section 164 of the Code before the JMFC, Wankaner but they have not supported the prosecution case and resiled from the statement made by them before the learned JMFC and have not supported the prosecution case. Out of the two witnesses, one witness's statement was also recorded under Section 161 of the Code before the police. According to him, it is true that the learned JMFC, Wankaner has stated that he has recorded statement of two witnesses wherein it is revealed that conspiracy is hatched by A-1 to A-4 on the one hand and A-5 to A-7 on the other hand. It is well settled law that statement made under Section 164 of the Code and that too without giving oath, which is not supported before the Court, is not a substantive evidence and it cannot be relied upon and no conviction can be based on such evidence. To canvass the proposition that statement recorded under section

164 of the Code is not a substantive evidence he has relied upon the following decisions of the Supreme Court:

(a) Ram Kishan Singh v. Harmit Kaur and another, (1972) 3 SCC 280;

(b) State of Delhi v. Ram Lohia, AIR 1960 SC 490;

(c) Chinnammal v. State of Tamil Nadu and others, (1997)1 SCC 145;

(d) George and others v. State of Kerala and another, (1998) 4 SCC 605.

(iv) The prosecution also tried to establish the complicity of the accused by leading the evidence of discovery panchnama made at the instance of four accused separately and they have shown their willingness to find out knives which were used by them for commission of the offence, in the presence of panchas. According to Mr. Barot though panchas have supported that in their

presence all the four accused persons have shown their willingness to show the place where the muddamal weapons were concealed and on the basis of the said statements knives were recovered, all the panchas are government servants and, therefore, they are selectee of the investigating officer and in each panchnama two panchas of same office are selected and, therefore, it cannot be coincident. Therefore, according to him, the selection of panch witnesses creates doubt and suspicion and hence no reliance can be placed upon the discovery panchnama. Moreover, the evidence of discovery panchnama of the weapons recovered at the instance of the accused suffers from a lot many infirmities like the recovery of knives alone is not sufficient to arrive at the conclusion of guilt when the evidence of eye witnesses is not acceptable and no reliance can be placed on the recovery of the weapons and no reliance can be placed as similar knives are available in the market. To canvass this proposition, he placed reliance on the following decisions:

(a) Anter Singh v. State of Rajasthan (2004) 10 SCC 657;

(b) Maruti Rama Naik v. State of Maharashtra, (2003) 10 SCC 670;

(c) Vikramjit Singh alias Vicky v. State of Punjab, (2006) 12 SCC 306;

(d) State of M.P. v. Kriparam, (2003) 12 SCC 675;

(e) Devinder Singh and others v. State of Himachal Pradesh, (2003) 11 SCC 488;

(f) Aslam Parwez v. Govt. of NCT of Delhi, (2003) 9 SCC 141;

(g) Salim Akhtar alias Mota v. State of U.P. (2003) 5 SCC 499;

(h) Narsinbhai Haribhai Prajapati, etc. v. Chhatrasinh and others, AIR 1977 SC 1753.

4.1. On the aforesaid premises, according to him, notwithstanding the aforesaid infirmities, the trial court has misread the evidence and misdirected itself and come to a wrong conclusion that the prosecution has established the complicity of accused for commission of offence of murder of deceased Prakashbhai.

4.2. Therefore, according to him, the impugned judgment and order of conviction and sentence recorded against A-1 to A-4 is the result of misreading of evidence which deserves to be quashed and set aside by allowing these appeals. Therefore, according to him, there is no evidence whatsoever adduced by the prosecution against the accused and, therefore, the impugned judgment and order of conviction and sentence requires to be quashed and set aside by allowing the appeals and acquitting the accused of the offence with which they are charged. He, therefore, urged to allow the appeals.

5. Mr. Manubhai Barot, learned advocate for A-5 and A-7 who have filed Criminal Appeal No.1925 of 2004, submitted that A-5 has died during pendency of the appeal, while undergoing treatment in Civil Hospital, when he was in jail. Mr. RC Kodekar, learned APP has submitted a report from the Deputy Superintendent of Central Jail, Vadodara, showing that A-5 has died on 11.1.2007 while he was in jail and undergoing treatment in Civil Hospital. A xeroxed copy of the certificate dated 12.1.2007 issued by the Medical Officer, Civil Hospital, Ahmedabad, showing that postmortem examination on dead body of Gangaram Tapubhai was done on 12.1.2007 at Civil Hospital, Ahmedabad, is also produced on record. In view of this, Mr. Barot has urged that the appeal filed by him has abated in view of the provisions contained under section 394 of the Code. He, therefore, urged to pass appropriate orders in this regard.

6. So far as A-7 is concerned, Mr. Barot made his submissions which are summarized as under:

(i) The prosecution has failed to prove the charge of criminal conspiracy hatched by A-7 in the company of A-5 and A-6 with A-1 to A-4 to murder Prakashbhai.

(ii) There was no motive on the part of A-7 to commit the offence as there was no enmity between A-7 and the deceased Prakashbhai to murder him.

(iii) The prosecution has tried to prove the alleged charge of criminal conspiracy hatched by A-7 with the help of the statement of P.W.119 Jayeshbhai and P.W.152, Abdulbhai, recorded under section 164 by the learned JMFC, Wankaner. However, both Jayeshbhai and Abdulbhai have turned hostile and, therefore, there is no substantive evidence.

(iv) To canvass as to under what circumstances criminal conspiracy hatched by accused inter se can be accepted, he has relied upon the following decision:

(a) K.R. Purushothaman v. State of Kerala, (2005) 12 SCC 631.

(v) Besides this, though P.W.158, Amrutbhai Prajapati, Executive Magistrate, who has recorded the statements of both the eye witnesses Jayesh and Abdulbhai, has supported recording of statement by him, it has no evidentiary value unless the maker of the statement supports his statement in his oral testimony before the Court because the statement recorded under section 164 is not under oath and, therefore, it is not a substantive evidence which can only be used for contradiction or corroboration.

(vi) As per the prosecution case, A-7 purchased four knives from P.W.112, Dhirajal from Anjar. However, the said witness has also not supported the prosecution case and he has not identified the knives which were allegedly discovered from A-1 to A-4. Even if the police statement is accepted in that case also he has

stated that the said knives were purchased prior to three months of the incident and therefore the conspiracy cannot be said to be hatched prior to 3 months of the incident as the alleged incident had taken place on 16.9.1999.

(vii) In the entire length and breadth of the prosecution case there is no evidence that A-7 hatched conspiracy in the company of A-5 and A-6 with A-1 to A-4. According to him, therefore, the impugned judgment and order of conviction and sentence recorded against A-7 deserves to be quashed and set aside by acquitting A-7 of the offence with which he was charged. He, therefore, urged to allow the appeal qua A-7.

6. Mr. SV Raju, learned advocate for A-6 who has filed Criminal Appeal No.1544 of 2004 has also made his elaborate submissions which are summarized as under:

(i) There was no motive on the part of A-6 to commit murder of deceased Prakashbhai.

(ii) As per the prosecution case, there was a motive on the part of the accused No.6 as there was a quarrel at unveiling ceremony, encroachment of chowk area and the threat by Prakashbhai of exposing the irregularities committed by A-6 in the patch up work of the roads of the Nagarpalika given to the relatives of A-6, coal business and supersession of the Nagarpalika by A-6 when Prakashbhai was the President of the Nagarpalika but they have not been proved by the prosecution. Video interview which was given by deceased on 14.9.1999 is also not proved by the prosecution. Even if it is proved then also the motive by itself cannot be proof of conspiracy as settled by catena of decisions of the Supreme Court.

(iii) The charge against A-6 is that there was political rivalry between A-6 and Prakashbhai and therefore he hatched a conspiracy with A-5 and A-7 and engaged 4 killers i.e., A-1 to A-4 to cause death of deceased Prakashbhai and therefore there

was a motive on the part of the A-6 to kill Prakashbhai. From the prosecution case, the conspiracy was hatched on 11.9.1999 as on that day A-5 Gangaram had a talk with A-6 on telephone which had taken place in presence of Jayeshbhai only, who has also turned hostile. Jayeshbhai could not say as to who was on the other side of the telephone. It is only A-5 Gangaram who told him that he had a talk with A-6, which cannot be accepted as evidence because Jayesh could not hear the conversation between A-5 and A-6. The statement under Section 164 is not a substantive evidence. The statement is not recorded on oath which is a mandatory requirement. Accused No.5 has independent enmity with deceased Prakashbhai and if conspiracy is proved it is between A-5 on one hand and A-1 to A-4 to on the other and A-6 has nothing to do with the alleged conspiracy. As per the prosecution case conspiracy was hatched on 11.9.1999 and the incident had taken place subsequent to 16.9.1999.

(iv) The deceased who was working as a stamp

vendor had enmity with several other persons as is reflected from the FIR. Video recording does not say about conspiracy and the same would not be admissible in evidence under section 32 of the Evidence Act. Section 10 of the Evidence Act cannot be made applicable in instant case as the opening word of the said section is that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong and, therefore, unless there is prima facie case that there was a conspiracy Section 10 does not come into operation. It is now well settled that motive and preparation themselves would not constitute conspiracy.

(v) A-6 was arrested on 24.9.1999 whereas statement under section 164 of P.W.119 was recorded on 15.10.1999 and P.W.152 was recorded on 30.9.1999. Therefore the prosecution has not been able to establish as to on what basis A-6 was arrested before the statements of P.W. 119 and P.W.152 were recorded.

(vi) Statement recorded under Section 164 of the Code is not a substantive evidence. In support of the aforesaid contentions, he placed reliance on the following judgments:

(a) Chinnammal v. State of T.N. and others (1997) 1 SCC 145;

(b) George and others v. State of Kerala and another, (1998) 4 SCC 605;

(c) Ram Kishan Singh v. Harmit Kaur and another, (1972) 3 SCC 280;

(d) State of Delhi v. Shri Ram Lohia, AIR 1960 SC 490;

(e) Balak Ram v. State of UP, (1975) 3 SCC 219.

(f) Guggilla Santhosh Reddy and another v. State of AP 2001 (2) Crimes 378;

(g) Javvadhi Sesha Rao and others v. State of A.P., XII-1994 (3) Crimes 1072;

(h) Brij Bhushan Singh v. Emperor, AIR 1946 PC 38;

(i) Dhaneshwar Thakur v. State, AIR 1958 Patna 412;

(j) Audumbar Digambar Jagdane and another v. State of Maharashtra, 1999 Cr.LJ 1936;

(k) Phool Chand and etc. v. State of UP, 2004 Cri.LJ 1904;

(l) Ram Lakhan Sheo Charan and others v. State of UP, 1991 Cri.LJ 2790;

On the aforesaid premises, according to him, there is no evidence against A-6 that he hatched a criminal conspiracy with the help of A-5 and A-7 on one hand and A-1 to A-4 on the other for committing murder of deceased Prakashbhai and

therefore the impugned judgment and order of conviction and sentence against the A-6 is based practically on no evidence and hence the same deserves to be quashed and set aside by allowing the appeal and thereby acquitting accused No.6 of the offence with which he was charged. He, therefore, urged to allow the appeal.

7. In response, Mr. RC Kodekar, learned APP appearing for the respondent – State of Gujarat has made his elaborate submissions which are summarized as under:

(i) Though it is true that all the eye witnesses who have seen the occurrence have not supported the prosecution case but that fact by itself cannot throw the evidence of the prosecution overboard without examining other circumstantial evidence.

(ii) There are circumstances to show the motive to murder Prakash prior to the incident has taken place. In this connection, the

prosecution has examined in all six witnesses and they have supported the prosecution case with regard to the motive on the part of A-5 to A-7 and therefore they have hatched criminal conspiracy with A-1 to A-4 and engaged them to kill Prakashbhai.

(iii) The statements of two witnesses recorded under Section 164 of the Code i.e., P.W.119 Jayesh and P.W.152 Abdulbhai have not supported their statement before the JMFC, Wankaner. However, in cross-examination, they have stated that their statements were recorded by the JMFC, Wankaner. Though, of course, in cross-examination they have stated that they have been administered threat and therefore they have given their statement before the learned JMFC, Wankaner. PW 158, Amrutbhai has also supported the version of recording their statement. Therefore, though they have turned hostile and not supported the prosecution case, their evidence can be relied upon and it can be used against the accused.

(iv) So far as the statement recorded of two witness i.e., P.W.119 Jayesh and P.W.152 Abdulbhai are concerned they have turned hostile but the defence cannot be benefited from it.

(v) The evidence of T.I. parade is consistent and in this connection two witnesses i.e., P.W.142, Ratilal and P.W.144, Devsibhai have identified A-1 to A-4 in presence of two panch witnesses P.W.138, Mahendrabhai and P.W.140, Jentilal, who have not supported the prosecution case but that fact itself is not sufficient to discard their evidence because another panch witness P.W.150, Tulsidas Shivlal Nakum has supported the prosecution case. Besides, P.W.148, Hasmukhbhai and P.W.151, Janakrai, Executive Magistrates who have held TI Parade have supported the evidence of T.I. Parade and therefore in TI Parade all the accused were identified by the witnesses and therefore this is one of the important circumstances to connect A-1 to A-4 with the alleged crime.

(vi) Discovery panchnamas of the weapons i.e., knives used by the accused for commission of the murder of Prakash were recovered at the instance of the accused by drawing panchnamas separately and the panch witnesses to those panchnamas unequivocally supported the prosecution case. Moreover, the weapons which were recovered were seen with human blood having 'O' group which is similar to that of the blood group of deceased Prakash which also unequivocally suggests that the prosecution has established the main important link to connect A-1 to A-4 with the alleged crime.

(vii) The discovery panchnama of the seat of motor cycle, NC register, etc. is not supported by the evidence of panch witnesses but these panchnamas are proved by the evidence of investigating officer and therefore reliance can be placed upon the said piece of evidence.

(viii) Panchnama of the scene of offence Ex.384 also unequivocally suggests that the form for

obtaining loan in the name of A-1 was found from the scene of offence which was also stained with 'O' group blood. It establishes the presence of A-1 at the relevant time at the scene of offence. Though panch witnesses of the panchnama of the scene of offence P.W.35, Vijaybhai Bhawanji and P.W.68, Babubhai Ravat have not supported the contents of panchnama, the contents of the panchnama are duly proved from the evidence of investigating officer.

(ix) So far as the discovery panchnama is concerned, there is no discrepancy and, therefore, that piece of evidence alone is sufficient to convict A-1 to A-4 with the alleged crime. In support of the aforesaid submission he relied upon the judgment of the Supreme Court in the case of Nasir Khan alias Guddu and others v. State of Uttaranchal, (2006) 9 SCC 386.

(x) So far as the conspiracy is concerned, according to him, there cannot be any direct evidence in this regard as it is very difficult

to get direct evidence. However, circumstantial evidence is available. In this regard he relied upon the reported decision in the case of Vijayan alias Rajan v. State of Kerala, AIR 1999 SC 1086.

(xi) In sum and substance, his submission is that the prosecution has successfully established the complicity of A-1 to A-4 who are the assailants and they have murdered Prakashbhai by hatching criminal conspiracy with A-5, A-6 and A-7 because of political rivalry with deceased Prakashbhai and therefore A-5, 6 and 7 who have hatched criminal conspiracy are equally responsible for commission of murder under section 302 IPC read with section 120B IPC. The trial Court has rightly held that the complicity of the accused for commission of murder of Prakash has been proved by the prosecution and they have been rightly convicted and sentenced and therefore the judgment and order of conviction and sentence does not call for any interference in these appeals and the appeals

lack merit and deserve to be dismissed. He therefore urged to dismiss all the appeals.

8. This Court has considered the submissions advanced by the learned advocates appearing for the appellants/accused and the learned APP for the respondent - State of Gujarat. This Court has also perused the impugned judgment and order, and the set of evidence which consists of 13 paper books. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record, which is read and re-read by the learned advocates of the parties with reference to broad and reasonable probabilities of the case. This Court has also perused the judgments referred to and relied upon by the learned advocates for the parties.

9. So far as the homicidal death of Prakashbhai is concerned, there is no dispute to the fact that deceased Prakashbhai died a homicidal death. To prove this fact, the

prosecution has examined P.W.1, Dr. Pragjibhai Jethabhai Bhadja, Ex.201. He has inter alia testified that on 16.9.1999 he was on duty as Medical Officer at Morbi Government Hospital. At 5:45 in the evening, injured Prakashbhai was brought by Anil Prabhulal Mehta to the hospital. He examined Prakashbhai and found him dead. He, therefore, informed Morbi City Police Station. On the same day at 11:30 at night he along with panel doctor M.A. Sanghvi started post-mortem examination on the dead-body of Prakashbhai. He has further testified that on examination, he found 18 external injuries on the dead body of Prakashbhai and he has noted the said injuries in the post-mortem report which is on record at Ex.206. He has also taken the blood sample from the dead-body of Prakashbhai and the said sample is produced on record at Ex.208. On a conjoint reading of the oral testimony of this witness and the post mortem report at Ex.206, it is clear that deceased Prakashbhai had sustained the following 18 injuries:

(i) Incised wound of size 1.5″ x 3/4″ x muscle deep upper Rt. gluteal Region edge – sharp cut Angles – sharp Direction Downward and Forward. Colour – red Blood clots, Adherent to tissue.

(ii) Incised wound of size 2.5″ x 1/2″ x muscle deep on Lt. Neck – Posteriorly edge sharp cut, Angle – Sharp, colour – red blood clots, Adherent.

(iii) Incised wound of size 3.0″ x 1″ x muscle edge sharp cut, Angles sharp, colour red blood clots, adherent.

(iv) Incised wound of size 1 3/4″ x 1/2″ x muscle deep oblique below injury No.3 edges sharp cut, sharp angles, colour red blood clots adherent to tissue.

(v) Incised wound 1″ x 1/2″ x muscle deep oblique above injury No. 3, 4, edge sharp cut angles sharp, colour red, blood clots.

(vi) Incised wound 3/4″ x 1/2″ x skin deep size 4/3 – M/3 – Lt. Forearm post, clots, edge sharp cut, sharp angles, colour red.

(vii) An incised stab wound of size 1 1/4″ x 1/4″ x cavity deep on Lt. Upper / Lt. Part chest

Nr. Shoulder, Nr. Axillary Fold, about 3″ below clavicle, edge sharp cut, angles sharp, oblique, direction, downward medially, posteriorly blood clots present adherent to tissue, colour red.

(viii) Incised would 2.3/4″ x 1/2″ x muscle deep on Lt. Side neck, anterior, left part, edge sharp cut, sharp angles, blood clots present, colour red, direction- downwards / med.

(ix) An incised wound of size 1″ x 1/2″ x muscle deep on Rt side of neck, anterior and lower part, edge sharp cut, oblique angles sharp – direction downwards, medially and backwards, neck vessels, common carotid artery, Int. Jugular vein cut blood clots present, adherent to tissue, colour red.

(x) Incised wound 2 1/4″ x 1/2″ x muscle deep on Rt neck, Ant. Part, above injury No.9 edge sharp cut, angles – sharp – oblique direction – downwards, medially, colour red blood clots present adherent.

(xi)Incised wound 2″ x 3/4″ x muscle deep Rt. side neck – Ant. Part above injury No.10 edge sharp, angles sharp, direction – downward and

medially, blood clots present adherent to tissue, colour red.

(xii) Incised wound 1″ x 1/2″ x muscle deep size below Rt. clavicle – L/3 (lateral), edge sharp cut angles sharp, direction – downwards and posteriorly.

(xiii) Incised wound of size 3/4″ x 1/4″ x muscle deep med and above injury No.12, over clavicle, edge sharp cut, angles, sharp, blood clots, colour red.

(xiv) Incised wound size 3″ x 1″ x muscle deep post to Lt. End / part clavicle – behind injury No. 12 edge sharp, colour red blood clots, adherent – direction downwards and posteriorly.

(xv)Incise wound – stab wound of size 1 1/2″ x 1/2″ x cavity deep on Rt. upper chest Nr. Sternum area below Rt. sterno – clavicular edge sharp cut, transverse like, angles sharp, direction, downwards and backwards – colour red, blood clots.

(xvi) Incised wound Rt. wrist lateral aspect 1.5″ x 3/4″ - muscle deep, edge sharp cut angles sharp, colour red, blood clots.

(xvii) Incised wound of size 1/2″ x 1/4″ x skin deep Rt. ring finger, edge sharp cut, colour red, blood clots, adherent.

(xviii) An abrasion 1/4″ x 1/4″ size on Rt. little finger of hand, colour red blood clots present, adherent age of abrasion – Fresh.

All wounds red in colour, blood clots adherent to tissues. Age of injuries – Fresh – All caused by injury No.1 – 17 sharp cutting object, injury No.18 – hard blunt object.

According to him, the cause of death of Prakashbhai was haemorrhagic shock due to external and internal haemorrhages due to multiple incised wounds, injuries to vital organ lungs and injuries to neck vessels.

9.1. On a conjoint reading of the oral testimony of P.W.1, Dr. Pragjibhai Bhadja and the post-mortem report at Ex.206 it is clear that deceased Prakashbhai had died a homicidal death and, therefore, the prosecution has been able to establish that Prakashbhai died a homicidal death

and we affirm the said finding of the trial court that deceased Prakashbhai died a homicidal death.

10. Now the next question which is required to be examined by us is as to whether the prosecution has successfully established the complicity of accused Nos.1 to 4 in the commission of murder of deceased Prakashbhai and also whether they hatched criminal conspiracy with A-5 to A-7.

11. In this regard, first of all, we shall examine the case of accused Nos.1 to 4 independently because as per the prosecution case they are the assailants whereas A-5 to A-7 were the conspirators and at the instance of A-5 to A-7, A-1 to A-4 have committed murder of Prakashbhai.

12. To prove the case against the accused on the basis of the evidence of eye witnesses the prosecution has examined and relied upon the evidence of the following witnesses who have

turned hostile:

PW No	Exh No	Part & Page No	Name of witness	Hostile /Supporting
105	664	7/2467	Umesh Zaverchand Popat	Hostile
106	665	7/2471	Ashokbhai Laljibhai Kathrani	Hostile
117	762	7/2650	Mahendrabhai Vrajdas Raygalla	Hostile
118	763	7/2654	Jayesh Durlabhji	Hostile
141	686	8/2919	Anilbhai Prabhulal Mehta	Hostile
142	873	8/2931	Ratilal Premjibhai Samaniya (Suthar)	Hostile
143	878	8/2971	Salemanbhai Husenbhai Chania Sanghi	Hostile
144	879	8/2975	Devshibhai Thobhanbhai Rabari	Hostile
149	909	8/3035	Rajeshbhai Dharabhai	Hostile
152	921	8/3064	Abdul alias Anis Ismailbhai Sanghi	Hostile

13. In view of the aforesaid none of the eye witnesses have supported the prosecution case and therefore the prosecution is unable to prove the case against the accused on the basis of the evidence of eye witnesses.

14. The next evidence on which heavy reliance is placed upon is the evidence of T.I. parade to prove the case against A-1 to A-4 and the prosecution has examined and relied upon the evidence of P.W.142, Ratilal and P.W.144, Devsibhai Rabari, P.W.138, Mahendrasinh Jadeja, P.W.140, Jayantilal Merza and P.W.150, Tulsidas, the panch witness of T.I. Parade and P.W.148, Hanumantsinh Jadeja, P.W.151, Janakrai, Executive Magistrates who held TI Parade.

14.1. A perusal of the oral testimony of the above referred to witnesses, according to us, TI Parade was done in a mechanical manner against the rules and regulations of the Bombay Police Manual. From the above referred to evidence it is clear that except the two Executive Magistrates and one panch, none have supported the prosecution case.

14.2. On a perusal of the oral testimony of the above referred to witnesses, according to us, TI

Parade was done in a mechanical manner against the settled legal proposition of holding TI Parade by both the Executive Magistrates as they have admitted that they have not asked the clerk to get dummies for TI Parade having similar characteristics as to that of A-4. It is clearly admitted by the witnesses that besides asking his clerk to get dummies having similar age, he had not asked his clerk to get dummies having other similarities such as physical appearance, height, complexion of skin, etc.

14.3. Besides this, both the eye witnesses P.W.142, Ratilal and P.W.144, Devsibhai have not supported the prosecution case as well as two panchas have also not supported the prosecution case with regard to the holding of T.I. Parade.

14.4. It is held by the Apex Court in the case of Caetano Piedade Feranandes (supra) that evidence in regard to TI Parade is of corroborative nature and when the evidence of the eye witnesses, i.e., Ratilal and Devsibhai is not

acceptable, the TI Parade cannot improve the situation at all. In the case of Wakil Singh and others (supra), the Apex Court has in terms laid down the precautions to be taken care of by the person conducting TI Parade such as marks, etc., of the accused persons. It is also held that the Magistrate who had taken precautions cannot be proved by his mere signing the cyclostyled certificate to that effect, unless he deposes in the Court in that regard. In the case of Yeshwant v. State of Maharashtra (supra), the Supreme Court has held that when the Magistrate has not taken precautions or care to see that other similar persons as that of the accused are joined in the parade, the TI Parade looses its force.

14.5. Applying the principles laid down by the Supreme Court in the above referred to judgments to the facts of the present case, according to us, when two witnesses i.e., P.W.142, Ratilal and P.W.144, Devsibhai, who have allegedly identified the accused have not supported the prosecution case, it cannot be said that evidence with regard

to TI Parade is a substantive evidence and resultantly the prosecution has not been able to prove its case against the accused for commission of offence of murder of Prakashbhai on the basis of the TI Parade.

15. The prosecution thereafter to prove the case against A-1 to A-4 sought to rely upon the statement of P.W.119, Jayeshbhai, Ex.772 and P.W.152, Abdulbhai, Ex.927 recorded under Section 164 of the Code by the learned JMFC, Wankaner. It may be noted that both of them have not supported the prosecution case. P.W.119, Jayeshbhai has inter alia stated in his statement about the conspiracy hatched by A-5 and he met A-5 at his residence and in his presence A-5 made phone call to A-7 and thereafter A-5 informed him to kill Prakashbhai. Almost similar is the statement of P.W.152, Abdulbhai, wherein he has stated about the conspiracy and in that connection he was called by A-5 at his office.

15.1. In this connection, the prosecution has

tried to establish the contents of the statements by examining P.W.158, Amrutlal Chaturbhai Prajapati, Ex.986, JMFC, Wankaner, who recorded the statements of P.W.119, Jayesh and P.W.152, Abdulbhai, under Section 164 of the Code.

15.2. The question, therefore, arises for consideration of this Court is what is the evidentiary value of the statements of the witnesses recorded under Section 164 of the Code if the maker of the statement does not support the statement in the Court of law while recording his oral testimony.

To answer this question, it would be appropriate to refer to section 164 (5) of the Code which reads thus:

> **“164. Recording of confessions and statements**:
>
> XXX
>
> XXX
>
> (5) Any statement (other than a confession)

made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded."

15.3. A plain reading of section 164 (5) of the Code, it mandates that statement of a witness other than confession has to be recorded in the manner provided for recording of evidence. The word used is 'shall', and, therefore, it is mandatory. As far as recording of evidence is concerned, if the provisions of Section 164 of the Code are read with Section 4 of the Oaths Act, 1969, it is mandatory to make oath or affirmation of all witnesses. Therefore, Section 164 (5) of the Code read with Section 4 of the Oaths Act, 1969, makes it obligatory for the learned Magistrate to record on oath the statement of witnesses under Section 164 (5) of the Code. Since this procedure has not been

followed, the statement is required to be discarded.

15.4. Assuming that oath is not required to be administered to a person who is giving statement other than a confession before the magistrate under Section 164 of the Code, then also such a statement has to be treated like any other previous statement of a witness which can be used only for the purpose of contradicting or corroborating the evidence and it cannot be used as substantive evidence and no conviction can be based on such statement in view of catena of decisions of the Supreme Court.

15.5. In the case of Chinnammal v. State of Tamil Nadu (supra), the Supreme Court has held that the statement recorded under Section 164 of the Code under no circumstances can be treated as substantive evidence. In the case of George and others v. State of Kerala (supra), the Supreme Court has held that the statement recorded under Section 164 of the Code cannot be treated as

substantive evidence but it can be used only for contradiction or corroboration of the statement. In the case of Ram Kishan Singh (supra), it is held that the statement under Section 164 of the Code is not a substantive evidence. In the case of State of Delhi v. Shri Ram Lohia (supra), it is held that the statement recorded under Section 164 of the Code is not a substantive piece of evidence but it can be used for contradiction or corroboration of the evidence. In the case of Balak Ram (supra) the Supreme Court has held that it would be wrong to find fault with the investigating officer merely because he got the statements of witnesses recorded under Section 164. Nor can the evidence of a witness be discarded for the mere reason that his statement was recorded under section 164. But the evidence of witnesses whose statements are recorded under section 164 must be approached with caution. Such witnesses feel tied to their previous statements given on oath and have but a theoretical freedom to depart from the earlier version. A prosecution for perjury could be the price of that freedom.

It is, of course, open to the Court to accept the evidence of a witness whose statement was recored under section 164, but the salient rule of caution must always be borne in mind. That is, all the more necessary when almost all the eye witnesses are subjected to this tying-up process. In the case of Guggilla Santhosh Reddy (supra), the Andhra Pradesh High Court (DB) has held that the trial Court has erred in relying upon the statements of P.Ws., 2 to 6 recorded under section 164 of the Code as while recording their oral testimony in Court, they have resiled from the statements recorded under section 164 of the Code. The Andhra Pradesh High Court has held that in the said circumstances the trial court committed gross error by relying on statement of witnesses recorded under section 164. In the case of Javvadhi Sesha Rao (supra), the Andhra Pradesh High Court (DB) has held that statement recorded under Section 164 of the Code cannot be used as substantive evidence and conviction based on such evidence is not sustainable. In the case of Brij Bhushan Singh v. Emperor (supra), the

Privy Council has held hat the statement under section 164 of the Code cannot be used as substantive evidence and it can be used to cross-examine person making it. In the case of Dhaneshwar Thakur (supra), the Patna High Court has held that statement under section 164 cannot be used as substantive piece of evidence which can be used to cross examine the person who made it and the result may be to show that the evidence of the witness is false, but that does not establish that what he stated out of Court under section 164 is true. Where there are two inconsistent statements, one under section 164 of the Code and the other before the Sessions Court, testimony has to be rejected outright in absence of any independent corroboration. In the case of Audumbar Digambar Jagdana (supra), the Bombay High Court has held that statement recorded under section 164 of the Code cannot be used as a substantive evidence as the appellant turned hostile. In the case of Phool Chand (supra), the Allahabad High Court has taken similar view and held that witness not supporting their statement

under section 164 of the Code statement cannot be relied on for the purpose of conviction. In the case of Ram Lakhan Sheo Charan (supra), the Allahabad High Court has also taken similar view and held that statement under section 164 of the Code cannot be used as substantive evidence when it is not supporting the prosecution story in Court.

15.6. Applying the principles laid down by the Supreme Court in the above referred to judgments to the facts of the instant case, the statements of P.W.119 Jayeshbhai and P.W.152 Abdulbhai were recorded under section 164 of the Act. However, they have not supported their statement while recording their oral testimony in court. They have further stated that threat was administered to them that if they will not give their statements, they would be made accused. Therefore, under such threat they have given statement before the learned JMFC Wankaner. Merely because P.W.158, Amrutlal Prajapati, JMFC, Wankaner has made statement that those two

witnesses have made statement before him their statements have been exhibited at Ex.772 and 927 respectively but merely because those statements are exhibited they cannot be read in evidence as they cannot be treated as substantive piece of evidence as held by the Supreme Court as well as various High Courts in catena of decisions referred to above.

16. The prosecution has also tried to rely upon section 80 of the Evidence Act, 1872 for the purpose of proving the statements produced at Ex.772 and 927. Therefore, it would be appropriate to refer to section 80 of the Evidence Act which reads as under:

> “80. **Presumption as to documents produced as record of evidence:-** Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such

evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or magistrate, or by any such officer as aforesaid, the Court shall presume--

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."

16.1. In this connection, it would be appropriate to refer to the decision of the Allahabad High Court in the case of Ram Sanchi and others v. State, AIR 1963 Allahabad 308. In the said judgment, the Allahabad High Court has observed as under:

"The use of the expression 'statement' or 'confession' in Sec.80 in juxtaposition to a prisoner or an accused person, and the

context in which those words occur, point to the conclusion that it was intended that a statement as well as a confession of a prisoner or an accused person duly taken by a Magistrate was to be presumed to be genuine. It is not correct to say that the word 'statement' occurring in S.80 has reference to a statement made by a witness as distinguished from a 'confession' made by a prisoner or an accused person."

16.2. Applying the principles laid down by the Allahabad High Court in the above referred judgment to the facts of the instant case, according to us, the trial court has wrongly relied upon statement under section 164 of the Code of P.W.119 Jayesh and P.W.152 Abdul which are on record at Ex.772 and 927 and read them in evidence though they have not supported the said statements while recording their oral testimony in Court and have turned hostile.

16.3. In view of our aforesaid findings, we are

of the considered opinion that the prosecution has failed to establish the charge against A-1 to A-4 on the basis of statements of the two witnesses recorded under section 164 of the Code that they have hatched criminal conspiracy with A-5 to A-7 for committing murder of Prakashbhai.

17. Now the last piece of evidence which the prosecution sought to rely upon against the accused Nos.1 to 4 is the various panchnamas including discovery panchnama of the weapons i.e., knives, used by the accused Nos.1 to 4 for commission of the offence, recovery of motor cycle, NC register, recovery of seat of motor cycle.

18. In this connection, the prosecution has examined the relied upon the evidence of the following witnesses:

PW No	Exh No	Part & Pg.No.	Name of witness	Hostile/ Supporting
14	292	4/1626	Ramesh Arjan	Supporting

PW No	Exh No	Part & Pg.No.	Name of witness	Hostile/ Supporting
15	302	5/1653	Navinchandra Parshottam Shah	Supporting
18	311	5/1685	Bhavanbhai Jagabhai Malakiya	Supporting
26	338	5/1760	Govindlal Shantilal Joshi	Supporting
32	370	5/1820	Dilip Keshavlal Jani	Supporting
66	515	6/2144	Ghanshyamsinh Prabhatsinh Jadeja	Hostile
67	518	6/2150	Kasambhai Sidikbhai Kureshi	Hostile
68	519	6/2152	Babubhai Chakubhai Vania	Hostile
126	795	7/2736	Hemubhai Ukabhai Koli	Hostile
127	797	7/2741	Maheshbhai Natwarlal Vania (Shah)	Hostile

18.1. According to the prosecution case, A-1 to A-4 have shown their willingness to show the muddamal knives which have been used for commission of murder of Prakashbhai and therefore panchas were called and preliminary panchnamas were drawn and thereafter at the instance of A-1 to A-4 knives were recovered which were stained with blood group of 'O' which is similar to the blood group of deceased Prakashbhai. The prosecution has examined and relied upon P.W.14,

Rameshbhai Arjan, Ex.292, who is panch witness of the discovery panchnama of the recovery of knife (muddamal article 25) at the instance of A-3. The prosecution has examined and relied upon the evidence of P.W.15, Navinchandra Parshottam Shah, Ex.302, who is panch witness of the panchnama of recovery of knife (muddamal Article 37) recovered at the instance of A-2. The prosecution has examined and relied upon the evidence of P.W.18, Bhavanbhai Jagabhai Malkiya, Ex.311, who is the panch of the panchnama under which the muddamal knife (Article 33) was recovered at the instance of A-4 which was used for commission of the offence. The prosecution has examined and relied upon evidence of P.W.26 Govindlal Shantilal Joshi, Ex.338, who is the panch witness of the discovery panchnama under which the muddamal knife (Article 28) is discovered at the instance of A-1. All these panchnamas are exhibited. The said panchnamas are at Ex.293, 303, 312, 339 and 340. Panchnama Ex.293 is related to muddamal knife Article 25 recovered at the instance of A-3. Ex.303 is the panchnama related to discovery

of muddamal knife Article 37 at the instance of A-2. Ex.312 is the panchnama of discovery panchnama of muddamal article 33 knife at the instance of A-4. Ex.339 is the panchnama of discovery of the Article 28 knife at the instance of A-1 and Ex.340 is the panchnama of the mud.

18.2. It may be appreciated that all the above panch witnesses have inter alia stated in oral testimony before the Court as per the contents of the panchnamas. They have stated that A-1 to A-4 had shown their willingness and on the basis of their willingness the preliminary panchnama was drawn and thereafter the accused have taken the panchas and the police personnel at the place where they have concealed knives and they have found out knives from the concealed place and they have stated that muddamal article 25 which was recovered at the instance of A-3 was not having blood stain. It may also be noted that they were subjected to lengthy and detailed cross-examination by the learned advocates of the accused. So many suggestions regarding they

being government servants were selectees at the hands of the investigating officer and had given evidence as per the sweet will of the investigating officer and also that in their presence accused have not shown willingness nor in their presence the accused have shown the place where the knives were concealed. All the panch witnesses have repelled the said suggestions and denied that they are selectee being government servants.

18.3. On a conjoint reading of the oral testimony of the panch witnesses as well as the panchnamas there is no manner of doubt that all the four accused have shown their willingness and on the basis of their willingness preliminary panchnamas were drawn and they have led the panchas as well as the police officers to the place where they have concealed the knives and from the places shown by them they have found out the said knives.

18.4. It is settled principles of law that the

sole circumstance in the form of evidence of discovery panchnama is sufficient to connect the accused with the alleged crime. In this connection, it would be profitable to refer to the decision of the Privy Council in the case of Pulukuri Kottaya and others v. Emperor, AIR 1947 P 67. In the said case, the Privy Council has held as under:

> “The condition necessary to bring S.27 into operation is that the discovery of a fact must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is

required to relate.”

18.5. The Supreme Court in the case of Pandurang Kalu Patil and another v. State of Maharashtra, 2002 AIR SCW 366, has again reiterated the said principle which reads as under:

“The essence of S.27 is that it was enacted as a proviso to the two preceding Sections (see Ss.25 and 26) which imposed a complete ban on the admissibility of any confession made by an accused either to the police or to any one while the accused is in police custody. The object of making a provision in S.27 was to permit a certain portion of the statement made by an accused to a police officer admissible in evidence whether or not such statement is confessional or non-confessional. Nonetheless the ban against admissibility would stand lifted if the statement distinctly related to a discovery of fact. A fact can be discovered by the

police (investigating officer) pursuant to an information elicited from the accused if such disclosure was followed by one or more of a variety of causes. Recovery of an object is only one such cause. Recovery, or even production of object by itself need not necessarily result in discovery of a fact. That is why privy council said in AIR 1947 PC 67 that “it is fallacious to treat the fact discovered in the section as equivalent to the object produced”. No doubt, in a given case an object could also be a fact, but discovery of a fact cannot be equated with recovery of the object though the latter may help in the final shape of what exactly was the fact discovered pursuant to the information elicited from the accused. The word 'fact' in S.27 of the Evidence Act cannot be disjuncted from the adjoining word 'discovered'. Where statement of accused as recorded in memorandum is “I have kept the fire arm concealed behind the old house in a heap of wood”, the fact discovered by police

officer before whom statement is made is certainly not the gun. The fact discovered is that accused had concealed the gun behind the old house under a heap of wood. It was the same gun with which accused had fired and that aspect has been proved with the help of other evidence."

18.6. It is feebly contended by Mr. Barot that the panchas are government officers and were selectees of the investigating officer and therefore their evidence cannot be relied upon and has to be discarded. The said contention has no substance. There is no law laying down the said proposition either by the Supreme Court or by any High Court in India that merely because panchas are government servants their oral testimony should not be treated as reliable evidence. However, in instant case, a perusal of the evidence of panchas though they are government servants, were not instrumental in the hands of investigating officer. Of course they have been called from their offices but they

have acted in an independent and unbiased manner and therefore reliance can be placed upon their oral testimony.

18.7. So far as muddamal article 25 recovered at the instance of A-3 is concerned, it was not found stained with blood at the time of preparing panchnama and therefore it is contended that no reliance can be placed upon the said piece of evidence. The aforesaid contention has no substance and merit. Possibility cannot be ruled out that while concealing the knife he must have washed it and thereafter he must have concealed the same at the place where from it was recovered.

19. So far as the reported decisions of the Supreme Court cited by Mr. Barot to canvass the proposition that the discovery panchnama cannot be relied upon and read in evidence because eye witnesses have not supported the prosecution case and similar knives are available in the market are concerned, they rested on the facts of those

reported decisions. Therefore, it is not necessary to deal with those decisions in prolix and with a view not to burden this judgment more, this Court deems it expedient not to discuss all those reported decisions of the Supreme Court.

20. There is one more important piece of evidence in the form of panchnama of the scene of offence which is at Ex.384. To prove the said fact, the prosecution has relied upon the oral testimony of P.W.35, Vijaybhai Bhagvanjibhai Zariya, Ex.383 and P.W.68, Babubhai Chakubhai Vania, Ex.519. It may be noted that both the panchas have turned hostile and not supported the prosecution case. However, the panchnama is exhibited in the cross-examination of P.W.35. A perusal of the said panchnama it is seen that one application form bearing No.001351 of A-1 Rameshbhai Mohanbhai Vaghani with his residential address was found wherein he applied for loan of Rs.60,000/- for the purpose of purchasing rickshaw. On the said form also blood stains were found. Therefore, the said form was

recovered while preparing panchnama of scene of offence. This is one of the circumstances against A-1 about his presence at the time of occurrence at the place of incident. Therefore, this evidence can be relied upon to show that A-1 was present at the place of offence at the relevant time.

21. Though panchas of several other panchnamas in respect of recovery of handkerchief, seat of motor cycle, etc., with blood stains have turned hostile and not supported the prosecution case, those panchnamas are exhibited during the evidence of investigating officer and, therefore, they can be relied upon.

22. It is feebly contended that some of the panchas have turned hostile and not supported the prosecution case and therefore prosecution case cannot be relied upon and therefore the evidence adduced by the investigating officer about the panchnamas should be disbelieved. The said

contention is merely stated to be rejected. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It must be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right of veto to the panchas so far as that question of culpability of the accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer about the panchnamas, if otherwise found to be true and dependable, cannot be discarded by Court. In the instant case, the discovery panchnamas of knives

are proved by the evidence of panch witnesses and discovery of other articles as well as the panchnama of the place of offence is proved by the evidence of the investigating officer and, therefore, this contention is absolutely found meritless and has to be rejected.

23. Another important piece of evidence is the FSL report which is on record at Ex.250, forwarding letters of muddamal weapons, clothes, etc. as well as report of FSL which are at Ex.244, 245, 246, 247, 248, 249 and 250 respectively. The report of the FSL clearly shows that after analysis it was found that the muddamal articles were found to be stained with blood of 'O' group which is the same as blood group of deceased Prakashbhai. This is also one of the important circumstances which connect the accused with the alleged crime.

24. On over all view of the matter and on close analysis of the discovery panchnama, panchnama of the scene of offence and the FSL

report, there is no manner of doubt that the accused A-1 to A-4 were assailants and have killed deceased Prakashbhai in day light. All these circumstances unerringly lead to the conclusion that A-1 to A-4 are the culprits and therefore complicity for commission of murder of Prakashbhai is proved. The trial Court in paragraphs 31 and 32 of its judgment has elaborately discussed all these aspects and therefore it is not necessary for us to discuss the same in further detail. We therefore confirm the said finding of the trial court and we hold that A-1 to A-4 have committed the murder of Prakashbhai and complicity of A-1 to A-4 is duly established on the basis of these circumstantial evidences.

25. This takes us to examine the case of A-5 and A-7 who have filed Criminal Appeal No.1925 of 2004. It may be stated that Mr. Barot, learned advocate of the accused Nos.5 and 7 has submitted that A-5 has died while he was in jail and undergoing treatment in Civil Hospital on

11.1.2007 and therefore Criminal Appeal No.1925 of 2004 qua A-5 stands abated. Mr. RC Kodekar, learned APP, has produced jail remarks sheet in this regard which shows that A-5 has died on 11.1.2007. Therefore, Criminal Appeal No.1925 of 2004 qua A-5 stands abated under section 394 of the Code.

26. Now therefore we have to examine the appeal qua A-7 against whom the prosecution has pitted the allegation that on the basis of the statement recorded under section 164 of the Code, Jayesh and Abdulbhai have stated that deceased A-5 and A-6 in collusion with each other hatched conspiracy and decided to do away with Prakashbhai in which A-7 was also one of the co-conspirators. It is also alleged that A-7 has supplied the weapons to A-1 to A-4 after purchasing the same from P.W.112, Dhirajlal Shah of Anjar, Ex.710.

27. So far as conspiracy is concerned, the prosecution has tried to establish the charge of

conspiracy on the basis of the evidence of P.W.119 Jayesh and P.W.152 Abdulbhai, recorded under section 164 of the Code. While discussing the evidence against A-1 to A-4, we have considered the statements made by P.W.119 Jayesh and P.W.152 Abdulbhai at length and we have discussed at length and in detail on threadbare examination of the evidence as well as statutory provisions contained under section 164 of the Code that the prosecution has not been able to prove the charge levelled against A-1 to A-4 on the basis of the statements of the two witness Jayesh and Abdul on the basis of the statement recorded under section 164 of the Code and, therefore, A-7 also cannot be connected with the charge of criminal conspiracy on the basis of the said statement recorded under section 164 of the Code.

28. Besides this accused No.7 is the son of A-5 is a mere coincident who has nothing to do with the political rivalry between A-5 and deceased Prakashbhai.

29. To connect A-7 with the crime, the prosecution has examined and relied upon the evidence of P.W.112, Dhirajal Shah, Ex.710, from whom A-7 has allegedly purchased four knives as a part of the conspiracy and then supplied the same to A-1 to A-4 with which A-1 to A-4 have caused murder of deceased Prakashbhai Raveshia. A perusal of the oral testimony of this witness shows that he has not supported the prosecution case with regard to four knives having been purchased by A-7 at the relevant time. Therefore he was cross-examined at length by the learned APP who was shown the muddamal articles 25, 28, 33 and 37 which are knives and thereafter he has stated that they were not sold from his shop and he has not identified A-7 in the Court. When he was confronted with his previous statement he has denied the suggestion that A-7 along with another person came to his shop prior to 3-4 months to purchase the knives. From this confrontation it is on the contrary proved that this witness has stated before the police that the accused along

with another person had come to his shop prior to 3-4 months of the incident and purchased the knives. As per the prosecution case the alleged conspiracy was hatched on 11.9.1999 and if we accept the police statement of this witness, prior to 3 months of 11.9.1999 if he has purchased four knives then it cannot be a part of such conspiracy. In the entire length and breadth of the prosecution case there is nothing against A-7 to connect him with the offence of commission of murder of Prakashbhai. In that view of the matter, the prosecution has failed to prove the charge levelled against A-7 and, therefore, the judgment and order of conviction and sentence passed against A-7 deserves to be quashed and set aside by allowing the appeal filed by him by acquitting him of the offence with which he was charged.

30. Now this takes us to examine the case against A-6 who has filed Criminal Appeal No. 1544 of 2004 against whom also the charge is of conspiracy because of political rivalry between

him and deceased Prakashbhai and because of that reason he hatched conspiracy with deceased A-5. To prove this charge, the prosecution has relied upon the statement of Jayeshbhai and Abdulbhai recorded under section 164 of the Code. Since we have discussed this evidence in detail in earlier paragraphs of this judgment after referring to the various judgments of the Supreme Court as well as various High Courts and statutory provisions and have come to the conclusion that the said statements are not substantive piece of evidence and on the basis of it conviction cannot be recorded, we do not deem it necessary to repeat the same again and hold that on the basis of the statements of Jayesh and Abdulbhai recorded under section 164 of the Code, the charge against A-6 cannot be established.

31. To establish the charge with regard to conspiracy on the basis of the telephonic talk A-5 had with A-6 is concerned, following discrepancies are there:

(a) that the telephone record produced by the prosecution does not show making of such call;

(b) that the witness has not heard the voice of the person on the other side of the telephone, which is supposed to be A-6. He has not heard the conversation made by A-6;

(c) what is told to the witness Jayesh by A-5 is a hear-say evidence and it would not be admissible in evidence. Even section 10 of the Evidence Act would not come into play in view of the submission made with regard to section 10 of the Evidence Act.

(d) If the statement under section 164 of the Code is perused, it is clear that when A-5 has said to hang up the phone there is no agreement because of the fact that the proposal is put suggesting that if the person who is on the other side of the telephone requires such person A-5 is having such person and then immediately he is saying that the telephone is hanged;

(e) that the telephone call is alleged to have been made on 11.9.1999 whereas the other incidents, especially encroachment, rally, etc., are after the said incident i.e., on 14.9.1999. Even as far as the video recording is concerned, it is recorded on 14.9.1999 and it has not been telecast and viewed by any person.

32. In view of the above factual background, let us examine the law on criminal conspiracy under section 120B of IPC. Section 120B IPC reads thus:

> “120B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
>
> (2) Whoever is a party to a criminal

> conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

For the purpose of proving criminal conspiracy, the prosecution must establish the following:

(i) that the accused agreed to do or caused to be done an act;

(ii) that such act was illegal or was to be done by illegal means;

(iii) that some overt act was done by one of the accused in pursuance of the agreement.

To prove the criminal conspiracy, the prosecution must establish that there was meeting of minds between two persons to do an unlawful act. It is very difficult to get direct evidence to prove criminal conspiracy and it can be proved only by circumstantial evidence. However, it is not sufficient in order to convict a person under

this section, merely to prove that he had been associating with the other accused at a certain place and on his arrest endeavoured to extricate himself from being accused of some thing connected with the conspiracy; and the prosecution cannot complete what is necessary in order to show that he was a person who concerted with others by proving that he was friendly with the other accused and was anxious to escape observation or even was doing his best to conceal his whereabouts. In cases of conspiracy, the agreement between the conspirators cannot generally be directly proved, but only inferred from the established facts in the case. A conspiracy need not be established by evidence of an actual agreement between the conspirators and overt acts raise a presumption of an agreement and knowledge of the purpose of the conspiracy. The connection has to be established with the conspiracy and not with the separate acts of different conspirators which are the overt acts of the different individuals in proof of the conspiracy. Overt acts may properly be looked at

as evidence of the existence of a concerted intention and in many cases it is only by means of overt acts that the existence of the conspiracy can be made out. But the criminality of the conspiracy is independent of the criminality of the overt act. To prove conspiracy it is not necessary that there should be direct communication between each conspirer and every other but the criminal design alleged must be common to all.

33. To prove criminal conspiracy, section 10 of the Indian Evidence Act would be relevant, which reads as under:

> **“10. Things said or done by conspirator in reference to common design**.-- Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention

was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

33.1. The opening words of section 10 of the Evidence Act indicates that section 10 will come into play only when the Court is satisfied that there is a reasonable ground to believe that two or more persons have conspired together to commit an offence. In other words, unless there is prima facie evidence that a person was a party to the conspiracy section 10 does not come into operation.

34. In this connection, it would be appropriate to refer to the judgments of the Supreme Court in the case of Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra, AIR 1965 SC 682. In paragraph 8 of the said reported decision, the Supreme Court has observed as

under:

> “8. Before dealing with the individual cases, as some argument was made in regard to the nature of the evidence that should be adduced to sustain the case of conspiracy, it will be convenient to make at this stage some observations thereon. Section 120-A of the Indian Penal Code defines the offence of criminal conspiracy thus:
>
> “When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.”
>
> The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other

offence: it can be established by direct evidence or by circumstantial evidence. But S.10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co conspirators. The said section reads:

“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”

This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to

believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is so say, there should be a prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression “in reference to their common intention” is very comprehensive and it appears to have been designedly used to give it a wider scope than the words “in

furtherance of" in the English law: with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only "as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it". It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short, the section can be analyzed as follows: (1) there shall be a prima facie evidence affording a reasonable ground for a

Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a coconspirator and not in his favour. (emphasis supplied).

35. It is advantageous to refer to the decision of the Supreme Court in the case of Mohd. Khalid v. State of W.B., reported in (2002) 7 SCC 334. In the said decision, in paragraph 34, the Supreme Court has observed as under:

“34. The first condition which is almost the

opening lock of that provision is the existence of “reasonable ground to believe” that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement “in reference to their common intention”. Under the corresponding provision in the English law the expression used is “in furtherance of the common object”. No doubt, the words “in reference to their common intention” are wider than the words used in English law (vide Sardar Sardul Singh Caveeshar v. State of Maharashtra (1998) 4 SCC 351= 1998 SCC (Cri.)936”.

36. A conjoint reading of statutory provisions contained in section 120B IPC and section 10 of

the Indian Evidence Act and the above referred to two judgments of the Supreme Court, in the entire length and breadth of the prosecution case there was no existence of reasonable ground to believe that the conspirators have conspired together.

37. Because of the following reasons, the alleged conspiracy cannot be believed because the conspiracy was hatched on 11.9.1999 and everything was subsequent to the said date i.e., incident had taken place on 16.9.1999, A-6 was arrested on 24.9.1999 while statement of Jayesh was recorded under section 164 of the Code on 15.10.1999 whereas statement of Abdul under section 164 of the Code was recorded on 30.9.1999. Since prior to recording their statements under section 164 of the Code, A-6 was arrested, it has to be held that at that time there was no evidence against A-6.

38. The prosecution tried to establish the case against A-6 by pitting the motive that during the unveiling of the Vivekananda Statute

in Morbi deceased Prakashbhai complained to A-6 that police are taking bribe from luxury bus owners, including one luxury bus of Jayshreeben S. Gogani i.e., P.W.165, Ex.1096. This witness has turned hostile. It is also the case of the prosecution that at this ceremony A-6 asked the deceased to come and discuss the matter at the circuit house where Inspector Bhimjibhai Khambaliya P.W.39, Ex.399 was called and informed not to take any installments. It is alleged that there was a scuffle at the circuit house when the discussion was going on and the prosecution has suggested that A-6 had taken out a revolver. It is also the prosecution case that there was also motive on the part of A-6 to kill deceased Prakashbhai because he was in the process of exposing scandals of A-6 by a video recording on 14.9.1999 pertaining to road patch work and coal business, which was never telecast. It is also the prosecution case that there was enmity between A-6 and the deceased Prakashbhai on account of the fact that A-6 was instrumental for getting Morbi Municipality superseded when

Prakashbhai was its President. On the aforesaid grounds, it was alleged that deceased Prakashbhai was apprehending danger to his life from A-6.

39. It is settled proposition of law that motive alone is not sufficient to prove conspiracy. In the instant case the motive described by the prosecution is also very trivial in nature like difference of opinion on the occasion of unveiling of statue, removal of encroachment at the instance of A-6 and the irregularities committed by the relatives of A-6 in the road patch work, etc.

39.1. In this connection, it would be appropriate to refer to the judgment in the case of Girja Shankar Misra v. State of U.P., 1994 Suppl.(1) SCC 26. In paragraph 6 of the above referred to reported decision, the Supreme Court has observed as under:

> “6. So far as the motive aspect is concerned, both the courts below have held that there

were serious misunderstandings between the deceased and Girja Shankar Misra because of the illicit relationship between Girja Shankar Misra and PW 54, wife of the deceased. PW 54 herself has admitted about the illicit relations between her and Girja Shankar Misra and how the deceased objected and deprecated the same. We have gone through the evidence on this aspect and it can be accepted that there were serious misunderstandings between the accused Girja Shankar Misra and the deceased and therefore it is probable that Girja Shankar Misra had a motive. But motive by itself cannot be a proof of conspiracy.”(emphasis supplied).

39.2. In another decision of the Supreme Court in the case of Saju v. State of Kerala, AIR 2001 SC 175, in paragraph 11, the Supreme Court has taken the same view as under:

“11. Regarding the circumstance relating to the existence of motive, P.W.9 who is the

sister of Ms. Jameela deposed that the deceased had told her that the pregnancy conceived by her was through the appellant. According to her the appellant admitted the paternity of conceived child in the initial stage but denied the paternity attributed to him six months thereafter. The trial Court found that “in the answers elicited in the further cross-examination also it would appear that her version about the first source of knowledge about the pregnancy of Jameela was inconsistent and unnatural”. Dealing with her statement, the trial Court observed that P.W.9 had no occasion to meet Jameela as she was not visiting her mother's house and also because the second accused had consented for the marriage. The only evidence regarding the appellant being responsible for the conception of the child is the testimony of Nabeesa (P.W.6), the mother of the deceased. She had stated that she came to know about the pregnancy of Jameela only when she tried to fix her marriage with some

person and Jameela told her that she was in love with the appellant. It is not discerned from the testimony of P.W.6 that Jameela had conceived the child from the appellant. What the witness stated was only that Jameela and the appellant were in love and they knew each other for a period of two yeas before the death of Jameela. According to her the marriage between the deceased and the appellant could not be solemnized as they belonged to different religions. She never saw the deceased and the appellant talking as according to her they used to talk only in her absence. The appellant is stated to have visited the house of the aforesaid witness on 15.5.1991 and assaulted the deceased regarding which report Exhibit P-4 was lodged. According to her Jameela was killed while returning from the hospital where she had gone for a check up. Nowhere in her testimony Nabeesa (P.W.6) stated that the appellant wanted the child, conceived by Jameela, to be aborted. There is no positive

evidence proving or suggesting that the appellant was responsible for the pregnancy of the deceased. In the absence of evidence regarding the circumstance attributing the pregnancy of the deceased to the appellant and his insistence for abortion of the child, the important circumstance of motive cannot be held to have been proved. The trial Court, therefore, rightly did not rely upon the testimony of P.W.9 Amina with respect to the existence of the said circumstance. The testimony of P.W.18 Meharban who is the sister-in-law of the deceased also does not inspire confidence to link the appellant with the pregnancy of the deceased. P.W.2 who is the neighbour of the deceased stated that she had known about the pregnancy from Jameela herself. According to her the appellant had quarreled with Jameela in connection with the pregnancy. Despite denial of the appellant Jameela was stated to have asserted that she did not have sexual intercourse with anyone other than the

appellant. In her cross-examination the witnesses stated that the appellant never threatened Jameela. She admitted that the appellant had apparently told Jameela that he was not the father of the child in her womb. The witness conceded that she had no direct knowledge about the relationship of the deceased with the appellant. P.,W.3 who is a neighbour and husband of P.W.2 was declared hostile as he did not support the case of the prosecution. It was deposed by him that he was not aware that Jameela had requested the appellant to marry her. P.W.2 stated that the appellant had categorically stated that he was not responsible for the pregnancy as someone-else was responsible for it. The courts below, therefore, were not justified in holding this circumstance proved for the existence of criminal conspiracy to commit the crime of murder of the deceased. In the absence of any evidence suggesting the existence of a circumstance of insistence by the appellant for abortion, an important link

in the chain of circumstances attributed against him is missing. Even otherwise motive by itself cannot be a proof of conspiracy. In Girja Shankar Misra v. State of U.P., AIR 1993 SC 2618: (1993 AIR SCW 3384):1993 All LJ 1273) though it was found that there were serious misunderstanding between the deceased and the appellant because of the illicit relationship between the appellant and the wife of the deceased, yet the Court held that despite of the fact that the appellant had a motive, he could not be held responsible for hatching a conspiracy.” (emphasis supplied).

39.3. Therefore, according to us, the prosecution tried to establish the case against A-6 on the ground of motive but as per the settled law enunciated by the Supreme Court that motive alone is not sufficient to connect the accused with the alleged crime, the prosecution has failed to establish the case against A-6 on the ground of motive.

40. Now this takes us to examine the evidence of video recording by a local channel 'Hello Saurashtra' and in this connection the prosecution examined P.W.104, Khumansinh Dipubha Jadeja, Ex.661 and P.W.107, Hiteshbhai Keshubhai Thaker, Ex.666. It may be noted that this video recording which was done on 14.9.1999 was never telecast. Besides this, to prove that the deceased was apprehending threat to his life from the accused, the prosecution has examined and relied upon the evidence of three of his family members i.e., P.W.113, Jayshreeben Prakashbhai Raveshia, Ex.717, P.W.115, Kishorebhai Pragjibhai Raveshia, Ex.724, and P.W.116, Vinodbhai Pragjibhai Raveshia, Ex.728. The prosecution tried to establish that the video recording is in the nature of a dying declaration and the apprehension expressed by the family members of the deceased was also in the nature of a dying declaration of the deceased which can be relied upon and acted upon and on the basis of these pieces of evidence it is a clear case of commission of offence under Section 302 read with

Section 120B IPC committed by A-6.

41. In this connection, it is required to be noted that even if it is assumed that video recording is admissible in evidence under Section 32 of the Evidence Act, then also since the deceased was not under the apprehension of death when the video statement was recorded, the question of credibility of such a statement will also have to be looked into. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the reported decision in the case of State of M.P. v. Paltan Mallah and others, (2005) 3 SCC 169. In the said case, in paras 11 and 12 the Supreme Court has observed as under:

> “11. The entries in the diary and certain statements of the deceased recorded on a microcassette were sought to be made admissible as evidence under Section 32 of the Evidence Act. Section 32 of the Evidence Act says that the statement, written or oral,

of relevant facts made by a person who is dead, are themselves relevant facts, but this statement should have been made as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death when such question comes up for consideration by the court. It is true that when such statements were made, the maker of the statement need not be under the expectation of death. But nevertheless, these statements should give either the cause of his death or any of the circumstances which led to his death.

12. The entries in the diary and the representation Niyogi had submitted to the President of India were in general terms. He apprehended some danger at the hands of some industrialists as the agitation of the workers had been going on and in some instances the henchmen of the industrialists had unleashed physical violence on the workers. Even though he had mentioned the

names of some of the accused persons in the diary and in the cassette, that by itself may not be of any assistance to the prosecution to prove the case as the entries in the diary and cassette do not refer to any event which ultimately was the cause of his death."

In the case of Pakala Narayana Swami v. The King-Emperor, 40 Cr.LJ 364, the Privy Council has observed as under:

"A variety of questions has been mooted in the Indian Courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of

death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. “Circumstances of the transaction” is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in “circumstantial evidence” which includes evidence of all relevant

facts. It is on the other hand narrower than res gestae. Circumstances must have some proximate relation to the actual occurrence: though as for instance in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose.” (emphasis supplied)

42. On reevaluation of the evidence that the deceased had apprehended danger to his life as deposed by three family members of deceased Prakashbhai, in light of the decisions of the Supreme Court underlying the principle under Section 32 of the Evidence Act, credibility of such a statement would be affected if there is no evidence of apprehension of death at the time of recording of the statement. The video transcript will have to be examined in the following background:

(a) when the deceased recorded it there was no apprehension of death;

(b) the said video statement was never telecast on any TV channel though it was recored;

(c) the transcript shows that the deceased was highly ambitious and wanted to become an MLA and, therefore to project his ambition he wanted to take advantage of the Circuit House incident, and got it recorded;

(d) the Circuit House incident seems to have rattled the deceased and, therefore, to take revenge for the same the deceased got the recording done;

(e) the transcript reveals that he had disputes with several persons other than A-6, including A-5, Gangaram Tapu, P.W.39, Bhimji Alabhai Khambhaliya, PI, Bharatbhai Keshubhai Patel, Keshubhai Patel, Ratibhai and Hanubha and, therefore, even if it is admissible it is not credible and would be of no use. In any case, at the most the statement reveals motive which can never be a basis for hatching conspiracy.

43. The following discrepancies are also required to be noted:

(a) A-6 was arrested on 24.9.1999. The material regarding conspiracy, which, according to A-6 is not admissible, is to be found in the statement of Jayesh recorded under Section 161 of the Code on 4.10.1999. The statement of Jayesh under Section 164 of the Code was recorded on 15.10.1999 and the statement of Abdulbhai under Section 164 was recorded on 30.9.1999.

(b) As per prosecution case, the conspiracy was hatched on telephone on 11.9.1999 at about 8:30 P.M., when A-5 is alleged to have telephoned to A-6. Except the Circuit House incident all the other incidents, including Rekdi, encroachment, giving of representation, etc., all are subsequent to the said incident. Therefore, the deceased wanted to make the issue of the Circuit House incident and to humiliate A-6 by the said incident and this cannot be the basis or even

motive and in any case it cannot be a part of proof of conspiracy.

(c) Though the deceased in the first part of the Videography is stated to be talking to one Pravinbhai before his interview as per the transcript, said Pravinbhai has not been examined as a witness.

(d) There is no record produced of the telephone department, or record which is produced from the telephone department, showing that any telephonic talk was made on 11.9.1999 as suggested by P.W.119, Jayeshbhai in his statement recorded under section 164 of the Code.

(e) Even as far as pointing of revolver is concerned, there is a lot of inconsistency and discrepancy. P.W.170, Chudasama, investigating officer, in his deposition at Ex.1257, has categorically stated that P.W.43, Aniruddhsinh Andubha Jhala, Ex.417 has not stated in the police statement that A-6 had pointed revolver to

the deceased. Similar is the evidence of P.W.39, Khambhaliya, Police Inspector, Ex.399. Even in the video transcript, in the first part, when a pointed question is put at the interview to deceased Prakashbhai he does not mention that the revolver was shown to him. But he only says it in the subsequent part at the fag end of the interview. In the charge framed by the trial court also it is not stated that A-6 had pointed revolver.

44. The following important questions have not been put to A-6 under Section 313 of the Code while recording his further statement:

(i) pointing of revolver by A-6 at Circuit House to deceased Prakashbhai;

(ii)hatching of the conspiracy by A-5 and A-6 and telephonic talk between A-5 and A-6 for hatching the conspiracy.

45. In this connection, it would be

appropriate to refer to the following decisions of the Supreme Court:

(i) Rattan Singh v. State of Himachal Pradesh, AIR 1997 SC 768 (para 20);

(ii) Naval Kishore Singh v. State of Bihar, AIR 2004 SC 4421 (para 5);

(iii) Rahim Beg & another v. State of U.P., (1972) 3 SCC 759 (para 5).

The ratio laid down by the Supreme Court in the above referred to judgments is that examination of accused should not be carried out as an empty formality. Accused should be given opportunity to explain adverse circumstances in evidence by putting various items of evidence in form of question. Examination if done in slipshod manner may result in imperfect appreciation of evidence. Practice of putting the entire evidence against the accused in a single question and giving an opportunity to explain the same is deprecated.

46. Applying the principle laid down by the Supreme Court in the above referred to judgments to the facts of the present case, the trial court had not put questions with regard to pointing revolver by A-6 to deceased Prakashbhai as well as hatching of conspiracy, which are very relevant. Inspite of A-6 not being asked such questions, the trial court has recorded the conviction on the basis of these aspects. This is not permissible under the law.

47. On overall reappreciation of the evidence pitted against A-6, according to us, there is no evidence on record to show that A-6 had hatched conspiracy with A-5 and A-7 on the one hand and A-1 to A-4 on the other to kill Prakashbhai. The motive ascribed by the prosecution is not material and even if it is accepted then also motive alone cannot take the place of proof.

48. It may be stated that statement of Jayeshbhai and Abdulbhai recorded under section

164 of the Code is not substantive piece of evidence and the statement made by them cannot be used against A-6 as there is no supporting material. Even if it is used then also P.W.119 could not hear as to who was on the other side of the telephone to whom A-5 was talking. P.W.119, Jayeshbhai made the statement on the basis of the statement made by deceased A-5 that he had a talk with A-6, which is not a substantive piece of evidence.

49. The upshot of the above discussion is that:

(a) homicidal death of Prakashbhai is proved;

(b) complicity of A-1 to A-4 for commission of murder of Prakashbhai is proved on the basis of the circumstantial evidence, i.e., discovery panchnamas and other panchnamas as well as FSL report and, therefore, they had a common intention to cause death of Prakashbhai and in furtherance of their common intention, they committed murder of Prakashbhai Raveshia and are

therefore liable to be punished under Sections 302 read with Section 34 IPC and section 135 of the BP Act;

(c) criminal conspiracy on the basis of the statements of Jayesh and Abdul recorded under section 164 of the Code is not proved;

(d) the prosecution has failed to prove that A-6 or A-7 hatched criminal conspiracy to cause death of Prakashbhai;

(e) there is no evidence on record to show that A-7 purchased knives from Anjar and handed them over to A-1 to A-4;

(f) the prosecution has failed to prove complicity of A-6 and A-7 in commission of the offence of murder of Prakashbhai on the basis of the alleged conspiracy as well as motive ascribed to A-6;

(g) the trial court has wrongly recorded

conviction against A-6 and A-7 without any evidence on record;

(h) the trial court has wrongly considered the evidence in the form of statement of Jayesh and Abdul recorded under section 164 of the Code as well as wrongly considered the videography as an evidence to show that the deceased apprehended danger to his life and thereby has misdirected itself and recorded an erroneous finding;

(i) the prosecution has failed to prove complicity of A-6 and A-7 for commission of offence of murder of Prakashbhai.

50. On the aforesaid premises, the judgment and order of conviction and sentence recorded against A-1 to A-4 deserves to be confirmed and maintained and the appeals filed by them deserve to be dismissed whereas the judgment and order of conviction and sentence recorded against A-6 and A-7 deserves to be quashed and set aside by allowing the appeals filed by them and thereby

acquitting them of the offence with which they were charged.

51. For the foregoing reasons, Criminal Appeal Nos. 1422 of 2005 and 2234 of 2004 filed by A-1 to A-4 - Rameshbhai Mohanbhai Koli, Narottam Premji Koli (Bhaliya), Magan Gokal Koli and Pravin alias Dalo Laghubhai Koli, fail and accordingly they are dismissed. Resultantly, the impugned judgment and order passed by the trial court convicting and sentencing the accused Nos.1 to 4 for commission of offence punishable under section 302 read with section 34 IPC and under section 135 of the Bombay Police Act is hereby confirmed and maintained.

51.1. Criminal Appeal No.1925 of 2004 filed by A-5 and A-7 – Gangaram Tapubhai Koli and Amit Gangaram Koli (Agechaniya) stands abated qua A-5 since he has died during the pendency of the appeal whereas the appeal succeeds and accordingly it is allowed qua A-7. Resultantly, the impugned judgment and order passed by the

trial court convicting and sentencing A-7 for commission of offence under section 302 read with section 120B IPC is hereby quashed and set aside and A-7 is acquitted of the offence with which he was charged.

51.2. Criminal Appeal No. 1544 of 2004 filed by A-6 – Kantilal Shivlal Patel (Amrutiya) succeeds and accordingly it is allowed. Resultantly, the impugned judgment and order of the trial court convicting and sentencing A-6 for commission of offence under section 302 read with section 120B IPC is hereby quashed and set aside and A-6 is acquitted of the offence with which he was charged.

51.3. The order passed by the trial court against A-6 to pay compensation of Rs.1,50,000/- to the widow of Prakash Raveshia is also quashed and set aside.

51.4. Accused Nos.6 and 7 are in jail. Since the appeals filed by them are allowed and the

impugned judgment and order passed by the trial court convicting and sentencing them for commission of offence under section 302 read with section 120B is quashed and set aside and they are acquitted of the offence with which they were charged, the jail authorities are directed to release A-6 and A-7 forthwith from jail, if they are not required in connection with any other case.

51.5. It is reported by Mr. RC Kodekar, learned APP that A-4, Pravin alias Dalo Laghubhai Koli, was released on temporary bail with effect from 9.3.2007 and since 17.3.2007 he is absconding. The jail authorities are directed to take effective steps to procure his presence to serve out the remaining sentence and the learned Additional Sessions Judge, Gondal is also directed to issue non-bailable warrant against A-4 to procure his presence and send him to jail to serve out the remaining sentence.

51.6. Muddamal articles to be disposed of as

per the directions contained in the impugned judgment and order.

(A.M. Kapadia, J.)

(Harsha Devani, J.)

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